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COUNTER-STATEMENT OF THE CASE.

In 1965, The General Assembly of the Commonwealth of Pennsylvania amended the Public School Code of 1949, Section 1361, to provide for free transportation of elementary and high school students who regularly attend non-public, non-profit schools. The amendment further provides that the transportation shall be over established public school bus routes and the pupils shall be transported to and from points on such routes nearest and most convenient to the schools they attend.

Petitioner brought suit in Delaware County, Pennsylvania, seeking to enjoin the expenditure of public funds by a School District for that purpose. A like action was commenced immediately thereafter in Montgomery County, Pennsylvania. These suits were consolidated and the Supreme Court of Pennsylvania took original jurisdiction. Later a similar action was filed in Philadelphia against the Philadelphia School District and both parties intervened in the Supreme Court of Pennsylvania. This brief is in behalf of the Philadelphia School District as respondent.

ARGUMENT.

I. The Challenged Legislation Is a Valid Exercise of the State's Police Power.

The real issue in this case can be simply stated: Is the expenditure of public monies pursuant to the amended Act of the Pennsylvania Legislature, an unconstitutional establishment of religion, or is it a valid exercise of the state's police powers to care for the health, welfare and safety of its citizens, particularly the young?

It is to be noted that the Act makes transportation available to *any* pupil of a non-public, non-profit school and is not limited to transportation to and from schools conducted by religious groups.

It is significant that Pennsylvania's system of school bus transportation operates only in the absence of other adequate public transportation. Thus, striking down the 1965 Amendment to the Act would relegate these pupils to private cars or lengthy walks either in rural loneliness or in metropolitan traffic.

The superiority of a school bus as a safe method of transportation is beyond debate. Throughout the nation, motor vehicle codes provide special rules of the road for the protection of such vehicles.

The grim statistics of traffic fatalities and casualties dramatically illustrate the safety of school bus transportation.[1] And, in *Everson v. Board of Education*, 330 U. S. 1, 91 L. Ed. 711 (1946), the Court emphasized this fact.

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1. Then Secretary of Public Welfare, Arlin Adams, in testifying on this amendment, stated that "with respect to injuries, a person is five times as safe in a school bus as in a car. With respect to death, a person is ten times as safe in a school bus as in a car." In support of this statement, he cited statistics: "In 1963, there were 2.3 deaths per 100,000 miles, in cars, as compared to .2 deaths per 100,000 miles in school buses." (R. p. 4a)

Petitioner glossing over this most important factor, despite its prominence in the record, argues as though safety was totally absent and that the legislature's motive was simply to aid parochial schools.

Moreover, if Petitioner were correct *all* transportation of pupils attending sectarian schools at the taxpayer's expense would be forbidden. But, as is well known, Congress, legislatures, and governing bodies at lower levels regularly appropriate large sums of money for mass transportation. This is particularly true in Philadelphia where our commuter system is kept alive with Federal, State and County funds. Such appropriations make possible fares at less than cost. If Petitioner prevailed, no child whose origin or destination is a sectarian school would be permitted to use subsidized mass transportation. Moreover, if Petitioner were correct subsidized commuter trains would have to exclude commuters destined for churches or other places of religious worship or returning to their homes after worship.

But, Petitioner is not correct. Transportation to students attending sectarian schools is not absolutely prohibited. Indeed, there is no better reason for the use of such transportation than the child's health, safety and welfare. *Everson, supra.*

The reasons which impelled the Court to decide *Everson* are even more cogent today. In 1946, the Court deemed it dangerous to commit any chool child to the highways. That danger has multiplied many times.

Traffic has increased at an alarming rate and with it highway fatalities and casualties. Highways and streets passable 25 years ago can no longer be crossed without risk to life and limb despite traffic lights and electronic devices. Traffic circles, then thought a safety measure, have now become accident traps. In spite of speed limits imposed by law the toll of highway accidents mounts.

But, traffic is not the only sinister threat in the child's path to and from school. We cannot ignore the danger of

child molestation and even rape. We do not suggest that travel in a school bus removes the child from every danger. However, it does reduce substantially the child's exposure to danger. In any event, so the Pennsylvania Legislature thought. Rightly or wrongly, this is a matter wisely left exclusively to the discretion of that body.

As already alluded to, the law here under attack establishes no transportation for students of sectarian schools as such. It merely makes existing public bus routes available on a general basis. To deny a child these safety benefits because of attendance at a sectarian school, might well in itself violate the Constitution as a prohibition of the free exercise of religion protected by the First Amendment (made applicable to the states by the Fourteenth Amendment).

Even if allowing these children to share the existing bus routes at no expense to the sectarian schools incidentally aids such schools, it cannot amount to the establishment of a religion. It represents only a minute part of any school or church budget.

It is clear that we are dealing here with public welfare legislation. As this Court declared in *Everson* (330 U. S. 1, 7):

> "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. . . . The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitch hiking'."

and on p. 18:

> "[The] legislation, as applied, does no more than provide a general program to help parents get their chil-

dren, regardless of religion, safely and expeditiously to and from accredited schools."

In *Pierce v. The Society of Sisters,* 268 U. S. 510 (1925), the Court held that an act compelling school attendance in public schools only is an unconstitutional interference with the liberty of parents and guardians to direct the upbringing and education of children under their control. In commenting on *Pierce,* the Court in *Everson* stated on p. 18:

> "Parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular education requirements which the state has the power to impose."

It follows, therefore, that to deny to a child the benefits of this public welfare legislation merely because it goes to one qualified school rather than another is in itself a denial of equal protection under the Fourteenth Amendment.

II. Petitioner's Contention That the Challenged Act Is So Vague and Indefinite as to Violate the Fourteenth Amendment Does Not Stand Up Under Analysis.

Petitioner seems to think that the phraseology, "non-public elementary and high schools not operated for profit" is incapable of comprehension. We suggest that its meaning is too clear to be labored. Also, surprisingly Petitioner objects to the phraseology "over established public school bus routes". The fact is that every school district which provides bus transportation for its pupils does so over well recognized or established routes.

For a long time before passage of the 1965 Amendment, school children have been gathering on well known school bus stops, awaiting their bus transportation. These have become established public school bus routes and the chil-

dren involved obviously have no difficulty finding where these public school bus routes have been established.

Petitioner also objects to the provision of the Amendment that the pupils are to be transported to and from points on the established public school bus routes "nearest or most convenient to the schools which such pupils attend".

Here again the meaning is clear. All this means is that the points of boarding and destination must be as convenient as possible along the established public school bus routes. In any event, all of these are matters which are and must be vested within the administrative discretion of the School Board. Certainly there would be no reason to strike down an important piece of public welfare legislation on so flimsy a ground.

As Mr. Justice Musmanno, speaking for the majority of the Supreme Court of Pennsylvania so cogently stated: (Record, p. 26a)

> "Finally, the plaintiffs argue that Act 91 is unconstitutional because of 'vagueness'. The only thing vague in this entire situation is the charge of vagueness advanced by the plaintiffs. It is like a splash of rain that has no target and leaves no durable impression. A reading of Act 91 will reveal its stark simplicity, specificity and secularization. It has but one aim and that is to place nonpublic schools, in the matter of student transportation, in the same classification as public schools, so long as the nonpublic schools observe the public school curricula. There is nothing in either the Federal or State constitution, the laws of the Commonwealth, or in fundamental justice to prohibit so salutary an objective."

III. Everson Is Dispositive of the Case Sub Judice.

There is presented here no reason why the Court should re-examine *Everson* other than the fact that it was decided by a five to four vote. *Everson's* well established guideline

to the states has worked out well in the 20 years of its existence. Petitioner points to no fact which has occurred over these two decades which demands an overruling of *Everson.* Nor has Petitioner pointed to a fact which even suggests that any religion or religious sect has in any significant way been established as a result of application of *Everson.* The fact is that twenty years of experience in the practical application of *Everson* has not resulted in the establishment of any religion. *Everson's* vitality is unimpaired. At this late date its ruling ought not to be disturbed.

Accordingly, for the foregoing reasons, respondent respectfully requests the Court to deny certiorari.

Respectfully submitted,

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